Supreme Court, U.S.
FILED

No. 001528

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In The

Supreme Court of the United States

FRED KAYNE; STEPHEN KAYNE; MILTON T. OKUN; ROSEMARY OKUN; MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC. AS CUSTODIAN FOR MILTON T. OKUN INDIVIDUAL RETIREMENT ACCOUNTS; DON WOHL; GLEN TOBIAS; KEN BERG; ROBERT A. BRONSTEIN; BRONSTEIN FAMILY TRUST; BRUCE BURNAM; MARCIA BURNAM; KATHLEEN A. COHEN; WILLIAM CORBETT; CUTLER FAMILY TRUST OF 1989; MARTIN GOLDFARB, M.D.; RICHARD GUNTHER; HARPEL PARTNERS, L.P.; HARPEL WHEELOCK PARTNERS, L.P.; HARPEL INTERNATIONAL, LTD.; RICHARD L. MILSNER; JOEL RUMM, D.M.V.; VICTOR SCARAVILLI; TRI S PARTNERS; DREILÄNDER BETEILIGUNG OBJEKT DLF 93/14-WALTER FINK-KG, a limited partnership formed under the laws of Germany; and ZWÖLFTE DREILÄNDER BETEILIGUNG DLF 92/12-WALTER FINK-KG, a limited partnership formed under the laws of Germany,

Petitioners,

vs.

MTC ELECTRONIC TECHNOLOGIES CO., LTD., a corporation organized under the laws of Canada; MIKO LEUNG; SIT WA LEUNG; EDILBERTO V. POZON; PETER JENSEN; THOMAS LENAGH; ROBERT FARR; DAIWA SECURITIES AMERICA, INC.; BDO DUNWOODY WARD MALLETTE; MTC INTERNATIONAL CO., LTD; MTC ELECTRONICS (H.K.); MONA ELECTRONIC INTERNATIONAL CO., LTD.; DAVID WONG; GOODWIN WANG; ALAN LEUNG; RONALD W. DRIOL; HONG KONG BANK OF CANADA; and GRANDE HOLDINGS, LTD.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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3100

QUESTION PRESENTED

1. Can a case coordinated by the JPML and transferred to another district be forced to remain in the transferee district for further pretrial proceedings after coordinated proceedings have ended?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court below are those named in the caption and plaintiffs in the MTC Class Action.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Fred Kayne; Stephen Kayne; Milton T. Okun; Rosemary Okun; Merrill, Lynch, Pierce, Fenner & Smith, Inc. as Custodian for Milton T. Okun Individual Retirement Accounts; Don Wohl; Glen Tobias; Ken Berg; Robert A. Bronstein; Bronstein Family Trust; Bruce Burnam; Marcia Burnam; Kathleen A. Cohen; William Corbett; Cutler Family Trust of 1989; Martin Goldfarb, M.D.; Richard Gunther; Harpel Partners, L.P.; Harpel Wheelock Partners, L.P.; Harpel International, Ltd.; Richard L. Milsner; Joel Rumm, D.M.V.; Victor Scaravilli; Tri S Partners; Dreiländer Beteiligung Objekt DLF 93/14-Walter Fink-KG, a limited partnership formed under the laws of Germany; and Zwölfte Dreiländer Beteiligung DLF 92/12-Walter Fink-KG, a limited partnership formed under the laws of Germany, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, dated January 9, 2001, which appears in the Appendix at App. 1.

The decision denied a writ of mandamus following the Judicial Panel on Multidistrict Litigation's ("JPML") refusal to order remand, based upon the transferee District Court's refusal to suggest remand and the case of *In re Patenaude*, 210 F.3d 135 (3d Cir. 2000), *cert. denied*, 121 S.Ct. 565 (2000). *In re Patenaude* is inconsistent with 28 U.S.C. Section 1407(a) and this Court's opinion in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), holding that remand is required at the end of coordinated proceedings.

OPINIONS BELOW

The opinion of the Second Circuit appears in the Appendix at App. 1 and is unpublished.

The decision of the JPML appears in the Appendix at App. 3 and is unpublished.

The decision of the District Court appears in the Appendix at App. 6 and is unpublished.

The report and recommendation of the District Court Magistrate Judge appears in the Appendix at App. 8 and is unpublished.

The prior decision of the District Court appears in the Appendix at App. 11 and is unpublished.

JURISDICTIONAL STATEMENT

The decision of the Court of Appeals was entered on January 9, 2001.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

28 U.S.C. Section 1407 provides in pertinent part:

> "(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers may be made

by the Judicial Panel on Multidistrict Litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.

. . .

(f) The panel may prescribe rules for the conduct of its business not inconsistent with acts of Congress and the Federal Rules of Civil Procedure."

JPML Rule 7.5(a) provides:

"Potential 'tag-along actions' filed in the transferee district require no action on the part of the Panel and requests for assignment of such actions to the Section 1407 transferee judge should be made in accordance with the local rules for the assignment of related actions."

JPML Rule 7.6(d) provides in pertinent part:

"The Panel is reluctant to order remand absent a suggestion of remand from the transferee district court. If remand is sought by motion of a party, the motion shall be accompanied by:

(i) an affidavit reciting

(A) whether the movant has requested a suggestion of remand from the transferee district court, how the court responded to any request, and if no such request was made, why;

(B) whether all common discovery and other pretrial proceedings have been completed in the action sought to be remanded, and if not, what remains to be done; and

(C) whether all orders of the transferee district court have been satisfactorily complied with, and if not, what remains to be done; and

(ii) a copy of the transferee district court's final pretrial order, where such order has been entered."

STATEMENT OF THE CASE

The MTC Class Action

In early 1993, certain individuals filed securities class actions later denominated *In Re MTC Electronic Technologies Securities Litigation* in the U.S. District Court for the Eastern District of New York and in the U.S. District Court for the Central District of California. Counsel filing on behalf of plaintiffs in the Central District of California stipulated to dismissal of that action and consolidation of all MTC Class Action litigation in the Eastern District of New York. The MTC Class Action was settled in large part in October, 1997 with a pending trial date in January, 1998. Court approval of the Class Action settlement was entered on October 15, 1998. Defaults were entered in the Class Action against nonsettling defendants Miko Leung, Sit Wa Leung and Alan Leung on both claims by the Class Plaintiffs and cross-claims by various defendants and third party defendants. The only other nonsettling defendant is H.J. Meyers, which has been in involuntary Chapter 7 bankruptcy since 1999; no relief has been sought

from the bankruptcy stay, no claim has been filed in bankruptcy court by counsel for the class plaintiffs or any cross-claimant, and no pretrial order was filed for claims against H.J. Meyers with the MDL district court by the August 31, 2000 deadline for all non-*Kayne* related matters. All other third party actions and cross-claims related to the MTC Class Action have been settled or dismissed.

Kayne v. MTC

The original complaint in *Kayne v. MTC* was filed in the Central District of California in January, 1995. *Kayne* is an action by a group of investors in MTC common stock opting out of the class, and includes some different allegations, causes of action and trading dates. In June, 1995, pursuant to motion by some of the defendants and joined by the class plaintiffs, *Kayne* was transferred by the JPML to the Eastern District of New York pursuant to 28 U.S.C. Section 1407(a) for coordinated pretrial proceedings. *Kayne* was coordinated with the MTC Class Action for discovery, and prior to the Class Action settlement was ordered consolidated for trial as well by the transferee court.

Fact discovery in *Kayne*, limited to items noticed or subpoenaed as of November 14, 1997, has long since been concluded. Expert disclosure and discovery in *Kayne* has been concluded as well, with the exception of depositions of two defense experts which remain.

The Alter Ego Actions Against Grande Holdings

In August, 1997, BDO Dunwoody, a defendant in *Kayne* and in the MTC Class Action, filed a separate action in the Eastern District of New York against Grande

Holdings Limited, alleging that it was the alter ego of Grandetel (MTC's new name), and seeking indemnity and contribution based on MTC's liability. Daiwa Securities America, also a defendant in *Kayne* and in the Class Action, filed a similar action against Grande Holdings in January, 1998. All claims against Grande Holdings related to the Class Action have been settled; the remaining claims relate solely to *Kayne*. No motion was made with the JPML seeking to coordinate the actions against Grande Holdings as part of MDL 1059. Instead, the actions were filed directly in the Eastern District of New York pursuant to JPML Rule 7.5(a). Counsel for plaintiffs in *Kayne* was denied permission to participate in deposition discovery in the Grande Holdings actions, and the parties to those actions have continued to put off expert discovery, the effect of which has been to keep *Kayne* from being remanded for trial.

The Requests for Remand

On October 29, 1997, shortly after the Class Action settlement was announced, the U.S. District Judge in the Eastern District of New York, Honorable John Gleeson, issued an order to show cause requesting briefing as to why *Kayne* should not be immediately remanded to the Central District of California. On November 7, 1997, prior to this Court's ruling in *Lexecon*, Judge Gleeson ruled that *Kayne* would be returned to the Central District of California for trial, but declined to suggest immediate remand. After this Court's *Lexecon* decision, and after the Class Action settlement had been fully approved, on November 16, 1998 plaintiffs in *Kayne* moved Judge

Gleeson pursuant to JPML Rules 7.6(c) and (d) for a suggestion of remand to the JPML for remaining pretrial proceedings and trial. That request for a suggestion was denied on June 1, 1999, at least partially on the ground that third party actions by and against Canaccord Capital Corporation were still pending in the MTC Class Action (and potentially in *Kayne*). Within days after that decision, the Canaccord claims were settled with respect to both *Kayne* and the Class Action. Plaintiffs then renewed their motion for suggestion of remand, which was again denied on October 27, 1999, on the apparent basis that *Kayne* was "coordinated" with the alter ego actions against Grande Holdings, although those alter ego actions relate solely to *Kayne*.

Plaintiffs then sought remand directly from the JPML, which was denied on May 30, 2000 based on the JPML's conclusion that Judge Gleeson of the U.S. District Court for the Eastern District of New York "is in the best position to provide insight as to the future course of *Kayne* and the remaining MDL-1059 proceedings before him." Plaintiffs filed a writ of mandamus to the Second Circuit Court of Appeals. The Second Circuit ordered briefing on the merits and denied the writ without oral argument on January 9, 2001, citing *In re Patenaude*, 210 F.3d 135 (3d Cir. 2000) for the proposition that " 'the fact that all of the proceedings with which the individual action was "coordinated" had already concluded [did not] raise a bar' to continued district court jurisdiction."

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT'S DECISION RELIES ON THE THIRD CIRCUIT'S DECISION IN *IN RE PATENAUDE*, AND *IN RE PATENAUDE* IS CONTRARY TO 28 U.S.C. SECTION 1407(a) AND THIS COURT'S DECISION IN *LEXECON*

In *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), this Court set forth the outer boundaries of impermissible conduct by a transferee court with respect to a matter transferred to it by the JPML, in ruling that the JPML Rule allowing self-transfer for trial was unauthorized and exceeded the statutory authority of the JPML. The JPML's ruling in this case likewise exceeds the statutory authority of the JPML and endorses conduct directly or impliedly prohibited by *Lexecon*.

In re Patenaude, 210 F.3d 135 (3d Cir. 2000) read *Lexecon* as holding that "a proceeding that relates only to a single individual's case or claim can nonetheless be coordinated." 210 F.3d at 143. *Patenaude's* reading of *Lexecon*, however, is incorrect; the cited portion of the *Lexecon* opinion discussed the power of a transferee court to rule on a motion affecting only one of the actions before it. Plaintiffs do not dispute that the transferee court has such authority; however, when there are no longer any coordinated proceedings, allowing further pretrial proceedings in the transferee court violates both 28 U.S.C. Section 1407(a) and *Lexecon*. *Lexecon* never ruled on the situation existing here, i.e., the point at which remand is required when coordinated pretrial proceedings have ended. The procedural posture of *Lexecon* confronted by this Court

was after a judgment following a trial in the transferee court.

The language of Section 1407(a), mandating remand "at or before the conclusion of *such* pretrial proceedings" (*emphasis added*) necessarily refers to the "coordinated or consolidated pretrial proceedings" described earlier in that subsection, since otherwise the modifier "such" in the statute would have no meaning. To the extent that *Patenaude* holds to the contrary, it is simply wrong.

A case cannot be "coordinated" with itself. The Court should clarify the meaning of "coordinated" proceedings, and set forth guidelines as to when, prior to trial, a transferred case should be remanded when the case with which it was ordered coordinated is over and only proceedings specific to the transferred case remain.

II.

REMAND AND TRIAL CANNOT BE PUT OFF INDEFINITELY BY ALTER EGO CASES FOR INDEMNITY AND CONTRIBUTION THAT RELATE SOLELY TO THE CASE SOUGHT TO BE REMANDED, FILED AT THE ELEVENTH HOUR DIRECTLY IN THE TRANSFEREE DISTRICT WITHOUT A JPML DETERMINATION

BDO Dunwoody's complaint against Grande Holdings was filed shortly before the MTC Class Action settlement was agreed to in principle; Daiwa Securities America's complaint against Grande Holdings was filed after settlement of the MTC Class Action.

Grande Holdings participated in the settlement of all aspects of the Class Action, and there are no claims of any

sort pending by or against Grande Holdings related to the Class Action.

The Daiwa Securities America and BDO Dunwoody alter ego actions against Grande Holdings relate solely to *Kayne*, but discovery in those alter ego actions is in no way "coordinated" with *Kayne*; indeed, fact discovery in those cases commenced after fact discovery in *Kayne* had concluded, and counsel for plaintiffs in *Kayne* has been specifically precluded from appearing at depositions in those actions. Forestalling remand of *Kayne* based upon possible future expert discovery in the Grande Holdings actions is allowing the tail to wag the dog, particularly since the JPML never coordinated the *Kayne* case with the actions against Grande Holdings, and there is no independent jurisdictional basis in the Eastern District of New York for the alter ego proceedings against Grande Holdings. Allowing the late-filed alter ego actions to delay remand of *Kayne* is particularly egregious, since alter ego claims are normally filed after there is a judgment establishing the underlying liability against the initial defendant to which alter ego status is claimed to attach. See, e.g., *Wm. Passalacqua Builders v. Resnick Developers South*, 933 F.2d 131, 142 (2d Cir. 1991).

To allow filing of an allegedly separate alter ego action in the transferee court to forestall remand of the only case to which the alter ego claims apply, without an order by the JPML coordinating the actions, violates 28 U.S.C. Section 1407's requirements. Nowhere in the JPML statute is there any authorization of coordination by rule rather than by determination of the JPML panel itself. JPML rules cannot extend beyond what the statute authorizes, since under 28 U.S.C. Section 1407(f) such rules

must not be "inconsistent with acts of Congress and the Federal Rules of Civil Procedure." The only basis ever raised for alleged coordination of the alter ego cases with *Kayne* is JPML Rule 7.5(a). Like former JPML Rule 14(b), which was held to be in excess of the JPML's rulemaking authority in *Lexecon*, JPML Rule 7.5(a) exceeds the authority of 28 U.S.C. Section 1407(a) by allowing the coordination process to bypass the JPML.

III.

ALLOWING THE TRANSFEREE JUDGE'S FAMILIARITY WITH THE CASE TO THWART REMAND WOULD ALWAYS COUNSEL AGAINST REMAND AT ANY TIME PRIOR TO TRIAL

The Report and Recommendation of Chief Magistrate Judge Chrein, which is the only ruling that even attempts to detail the reasons for denying remand, makes much of Judge Gleeson's familiarity with the facts of the case as a reason to deny remand. The transferee judge's familiarity with the facts of the case, however, would always counsel against remand, since the transferee judge would always be more familiar with the facts of the case. The transferee judge will be more familiar with the facts of the case even if coordinated proceedings have completely concluded, i.e., if there is nothing left but the action sought to be remanded. That cannot be the meaning of 28 U.S.C. Section 1407(a), which mandates remand at the conclusion of *coordinated* pretrial proceedings.

It would seem not only required, but more appropriate that when coordinated proceedings have concluded, the action be remanded to the transferor court regardless

of whether further case specific pretrial proceedings remain. Otherwise, unless the case is entirely resolved in the transferee court either by settlement or dismissal, the district judge in the transferor court will be trying a case with which he has absolutely no prior familiarity.

IV.

JPML RULE 7.6(d), BY WHICH THE JPML GIVES ALMOST CONCLUSIVE DEFERENCE TO THE TRANSFEREE JUDGE, VIOLATES 28 U.S.C. § 1407

JPML Rule 7.6(d) sets up its own system for remand, by asking the transferee district judge for an advisory opinion that by the terms of the rule itself it will almost never override. This is improper.

28 U.S.C. § 1407(a) clearly provides that the JPML, using its independent judgment, shall oversee remand. Congress could have chosen the simpler route of having the transferee court rule on remand itself without having the case go back to the JPML panel. This is indicative of a conscious intent that the JPML panel independently determine when remand is appropriate; there is no statutory authority to undermine that intent by punting the remand issue to the transferee court.

An independent JPML determination is not just required, but logical. A district court judge devoting substantial time and effort to a case develops a vested interest in that case. As noted in Judge Kozinski's prescient dissenting opinion, in advocating the position adopted by this Court in *Lexecon*, "Soon after the MDL process got underway, a peculiar thing started happening: Judges began to develop proprietary feelings toward the cases

entrusted to them . . . ." *In re American Continental Corporation/Lincoln Savings & Loan Securities Litigation*, 102 F.3d 1524, 1540 (9th Cir. 1996) (Kozinski, J., dissenting), *reversed* in *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). While Judge Gleeson undoubtedly has the best of intentions in feeling responsible for guiding *Kayne* further toward trial prior to remand, when coordinated proceedings have concluded plaintiffs' choice of forum should govern. The parties are entitled to an independent determination by the JPML as to whether remand is appropriate, not predetermined by whether or not the district judge suggests remand.

CONCLUSION

JPML coordination serves a useful purpose when discovery common to multiple cases can be achieved in one forum. It should not be used as a mechanism to indefinitely delay a party's right to trial in the forum in which the case was originally filed. It is now over six years since *Kayne* was filed, and a trial date has yet to be set. The writ of certiorari should issue to clarify that remand to the original court for further pretrial proceedings is required when coordinated proceedings have ended.

Respectfully submitted,

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E.D.N.Y.
93-CV-0876
95-CV-2499
Gleeson, J.

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 9th day of January two thousand-one,

Present:

Hon. John M. Walker, Jr.,
Chief Judge

Hon. Roger J. Miner,

Hon. Rosemary S. Pooler,
Circuit Judges.

FILED JAN 9 2001

In re: Fred Kayne *et al*, Petitioners.	00-3059

Petitioners seek a writ of mandamus to direct the Judicial Panel on Multidistrict Litigation to remand this case for trial to the Central District of California, the court in which the original action was filed. Upon due consideration, it is hereby ORDERED that the petition be

DENIED. Petitioners have not sufficiently demonstrated that the Judicial Panel on Multidistrict Litigation clearly abused its discretion or usurped judicial power. *See United States v. Victoria-21*, 3 F.3d 571, 576 (2d Cir. 1993); *see also In re Joann Patenaude*, 210 F.3d 135, 143 (3d Cir. 2000) (stating that "the fact that all of the proceedings with which the individual action was 'coordinated' had already concluded [did not] raise a bar" to continued district court jurisdiction).

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/ Lucille Carr

(Filed May 30, 2000)

DOCKET NO. 1059

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION
IN RE MTC TECHNOLOGIES COMPANY LTD. SECURITIES LITIGATION

***Fred Kayne, et al. v. MTC Electronic Technologies Co., Ltd., et al.*, E.D. New York, C.A. No. 1:95-2499 (formerly, C.D. California, C.A. No. 2:95-422)**

BEFORE JOHN F. NANGLE, CHAIRMAN, WILLIAM B. ENRIGHT, CLARENCE A. BRIMMER, JOHN F. GRADY, BAREFOOT SANDERS, LOUIS C. BECHTLE AND JOHN F. KEENAN, JUDGES OF THE PANEL

ORDER DENYING REMAND

Before the Panel is a motion for remand brought, pursuant to Rule 7.6, R.P.J.P.M.L., 181 F.R.D. 1, 11-13 (1998), by plaintiffs in the above-captioned action (*Kayne*) seeking remand of *Kayne* to the Central District of California from the Eastern District of New York, where it has been included in centralized pretrial proceedings occurring in this docket before the Honorable John Gleeson. Opposed to remand are various *Kayne* and MDL-1059 defendants.

On the basis of the papers filed and the hearing held, the Panel finds that remand of *Kayne* at this time is not appropriate. The following quotation from an earlier Panel opinion is very instructive for situations such as this, where no recommendation of remand has been made to the Panel by the transferee judge:

> The Panel's Rules of Procedure provide that the Panel shall consider the question of remand

> on the motion of any party, on the suggestion of the transferee court or on the Panel's own initiative. Rule [7.6(c)], R.P.J.P.M.L., [181] F.R.D. [1, 12 (1998)]. In considering the question of remand, the Panel has consistently given great weight to the transferee judge's determination that remand of a particular action at a particular time is appropriate because the transferee judge, after all, supervises the day-to-day pretrial proceedings. *See, e.g., In re IBM Peripheral EDP Devices Antitrust Litigation*, 407 F.Supp. 254, 256 (J.P.M.L. 1976). The transferee judge's notice of suggestion of remand to the Panel is obviously an indication that he perceives his role under Section 1407 to have ended. *In re Air Crash Disaster Near Dayton, Ohio, on March 9, 1967*, 386 F.Supp. 908, 909, (J.P.M.L. 1975). Absent a notice of suggestion of remand from the transferee judge to the Panel, any party advocating remand before the Panel bears a strong burden of persuasion. We rule that movants have not met this burden here and that the motion for remand is premature.

In re Holiday Magic Securities and Antitrust Litigation, 433 F.Supp. 1125, 1126 (J.P.M.L. 1977).

Judge Gleeson, in his capacity as transferee judge, has become thoroughly familiar with the issues in this complex docket involving claims asserted against a myriad of defendants arising out of sales of securities of MTC Technologies Co. Ltd. He has made great progress and has shepherded class settlements with respect to most of the principal defendants. Movants view these accomplishments as reasons why *Kayne* now can be remanded without further delay, but we view them instead as evidence of why Judge Gleeson is in the best position to

provide insight as to the future course of *Kayne* and the remaining MDL-1059 proceedings before him. We find that movants, having failed on four separate occasions (most recently at the end of October 1999) to persuade Judge Gleeson (or the magistrate judge assisting him in the management of this docket) that remand of *Kayne* was appropriate, have also failed to convince the Panel that it should order remand in the absence of a suggestion of remand from Judge Gleeson. Accordingly, we will deny remand.

IT IS THEREFORE ORDERED that the motion for Section 1407 remand of *Kayne* be, and the same hereby is, DENIED.

FOR THE PANEL,

/s/ John F. Nangle
John F. Nangle
Chairman

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

ORDER

In re MTC ELECTRONIC TECHNOLOGIES SHAREHOLDER LITIGATION

Master File No. 93-CV-867 (JG)
MDL No. 1059

95-CV-2499 (JG)

THIS DOCUMENT RELATES TO:
FRED KAYNE, et al. v. MTC ELECTRONIC TECHNOLOGIES CO., LTD., et al.

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JOHN GLEESON, United States District Judge:

On June 1, 1999, I denied the plaintiffs' request for an order suggesting that the Judicial Panel on Multidistrict Litigation remand the case back to the Central District of California. Twenty-two days later the plaintiffs renewed their motion, and I referred the matter to Chief Magistrate Judge A. Simon Chrein for a report and recommendation.

On August 27, 1999, Judge Chrein recommended that I deny the renewed motion. For the reasons given in both Judge Chrein's opinion and in my June 1 order, the motion is denied.

So Ordered.

/s/ John Gleeson
John Gleeson, U.S.D.J.

Dated: October 27, 1999
Brooklyn, New York

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK	Master File No. 93-CV-876 (JG) 95-MD-1059
In re MTC ELECTRONIC TECHNOLOGIES SHAREHOLDERS LITIGATION	REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE A. SIMON CHREIN
FRED KAYNE, et al., Plaintiffs, – against – MTC ELECTRONICS TECHNOLOGIES CO., LTD., et al., Defendants.	95-CV-2499 (JG)

By order dated June 22, 1999, the Honorable John Gleeson referred to the undersigned, for a report and recommendation, the renewed motion of Plaintiffs under 28 U.S.C.A. § 1407(a) for an order suggesting that the Judicial Panel on Multidistrict Litigation ("JPML") remand the above-captioned matter to the Central District of California. For the reasons set forth herein, it is the respectful recommendation of the undersigned that Plaintiffs' motion be denied.

As expert discovery in the above-captioned matter appears to be ongoing, Judge Gleeson's familiarity with the issues involved in *In re MTC* continues to counsel against remand. In addition, there are pretrial motions in this case that remain to be resolved. Finally, Plaintiffs' renewed motion was made a mere twenty-two (22) days after Judge Gleeson's order of June 1, 1999 denying their

original motion to remand. In the intervening time period, the only *MTC*-related event that occurred was the withdrawal of third-party defendant Canaccord Capital from the following cases: *Farr v. Hong Kong Bank of Canada*, 96-CV-3129; *Farr v. Hong Kong Bank of Canada*, 96-CV-3130; and *Dunwoody v. Levesque Securities*, 97-CV-522. Cancaccord's withdrawal from these cases does not alter the landscape of *In re MTC* such that remand is now appropriate.

To the extent that the parties have relied on *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*, 523 U.S. 26 (1998), this reliance is misplaced. The narrow issue decided in *Lexecon* was "whether a district court conducting . . . 'pretrial proceedings' [under 28 U.S.C. § 1407(a)] may invoke § 1404 [under Title 28, the venue transfer statute] to assign a transferred case to itself for trial." *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*, 523 U.S. 26, ___ (1998). While the Lexecon Court might have uttered dicta useful to Plaintiffs, Defendants, or both parties, its holding was inapposite to the present motion. It should also be noted that Defendants are correct to point out that a case may be a "coordinated case" even if the JPML has not itself taken action on it; the JPML Rules indicate that "Potential 'tag-along actions' filed in the transferee district require no action on the part of the Panel," JPML Rule 7.5(a), and define "tag-along action" as one "pending in a district court and involving common questions of fact with actions previously transferred under § 1407." JPML Rule 1.1.

Counsel for Plaintiffs is hereby directed to serve a copy of this report and recommendation on all parties that have appeared in the above-captioned matter.

CONCLUSION

For the foregoing reasons, it is the respectful recommendation of the undersigned that Plaintiffs' renewed motion for an order suggesting remand be denied. Any objections to the recommendation contained herein must be filed with the Honorable John Gleeson on or before September 13, 1999. 28 U.S.C. § 636; Fed. R. Civ. P. 6, 72. Failure to object will preclude appellate review.

Dated: Brooklyn, New York
August 27, 1999

/s/ A. Simon Chrein
A. SIMON CHREIN
United States Magistrate
Judge

UNITED STATES
DISTRICT COURT
EASTERN DISTRICT OF
NEW YORK

ORDER

CV 93-0867 (JG)

IN Re

MTC ELECTRONIC
TECHNOLOGIES
SHAREHOLDER
LITIGATION

CV 95-2499 (JG)

MDL No. 1059

This Document Relates to:

FRED KAYNE, et al. v.
MTC ELECTRONIC
TECHNOLOGIES CO.,
LTD., et al.

JOHN GLEESON, United States District Judge:

Relying on *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956 (1998), plaintiffs have moved under 28 U.S.C. § 1407(a) for an order suggesting that the Judicial Panel on Multidistrict Litigation remand the case to the Central District of California. The motion is premised on the plaintiffs' assertion that the "coordinated" pretrial proceedings envisioned by 28 U.S.C. § 1407(a) have been concluded.

I disagree. There are various MTC Electronic Technologies-related matters other than *Kayne* still pending before me, and I am persuaded that the efficiencies achieved by coordinated pretrial proceedings counsel against a suggestion for a remand at this time. Accordingly, the motion is denied.

The denial of plaintiffs' motion is without prejudice to its renewal as the remaining pretrial proceedings progress. A renewed application need not await the conclusion of all such proceedings.

So Ordered,

/s/ John Gleeson
John Gleeson, U.S.D.J.

Dated: Brooklyn, New York
June 1, 1999

(2)

No. 00-1528

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FRED KAYNE, *et al.*,

Petitioners,

—v.—

MTC ELECTRONIC TECHNOLOGIES CO., LTD., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT DAIWA SECURITIES AMERICA INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Did the Court of Appeals for the Second Circuit err in refusing to issue an extraordinary writ of mandamus directing the Judicial Panel on Multidistrict Litigation to remand immediately a case transferred pursuant to 28 U.S.C. § 1407 when (i) pretrial proceedings in the transferred case are not yet complete, and (ii) pretrial proceedings in other coordinated cases are also ongoing before the transferee court?

RULE 29.6 LISTING

Pursuant to Supreme Court Rule 29.6, Respondent Daiwa Securities America Inc. ("Daiwa") states that it is a wholly-owned subsidiary of Daiwa America Corporation.

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COUNTER-STATEMENT OF THE CASE

Since February 1993, litigation arising from alleged securities fraud at MTC Electronic Technologies Co., Ltd. ("MTC"), including class actions styled *In re MTC* and *Ellis v. Leung*, has been pending in the Eastern District of New York. On January 23, 1995, certain of the petitioners, putative opt-out plaintiffs, commenced *Kayne v. MTC Electronic Technologies Co., Ltd.* ("*Kayne*") – a securities fraud case largely duplicative of the MTC-related class actions already before the New York federal court – in the Central District of California.[1] Petitioners seek recovery against MTC, its former principals Miko and Sit Wa Leung, certain former directors and officers of MTC (the "Individual Defendants"), MTC's former auditor BDO Dunwoody ("BDO"), Daiwa (underwriter of MTC's 1993 public offering of securities) and others. In June 1995, before any proceedings respecting *Kayne* took place in California, the Judicial Panel on Multidistrict Litigation ("JPML") transferred *Kayne* to the Eastern District of New York, pursuant to 28 U.S.C. § 1407, for "coordinated or consolidated pretrial proceedings," in MDL 1059, with other MTC-related cases.

Following the JPML's transfer order, Judge Gleeson and Chief Magistrate Judge Chrein have supervised all of the pretrial proceedings in *Kayne* and the other MTC-related litigation. They have held numerous hearings, ruled on countless substantive and discovery matters, and gained close familiarity with complex factual and legal contentions in coordinated cases involving over 5,000 deposition exhibits, some 150,000 pages of deposition testimony and production of nearly one million pages of documents.

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[1] The remaining petitioners asserted MTC-related claims through amendments to the *Kayne* complaint in 1996 and 1997.

Under the guidance of Judge Gleeson and Magistrate Judge Chrein, *Kayne* and the other MTC-related litigations have reached a highly advanced stage of pretrial proceedings. The parties to *Kayne* have completed fact discovery, exchanged expert reports, and are completing the depositions of expert witnesses. The district court is considering motions for approval of settlements by BDO and third-party defendant HSBC Bank Canada ("HSBC") with petitioners and will be asked to set a briefing schedule for dispositive motions in *Kayne*. The proposed settlements – as to which the settling parties seek bar orders and good faith determinations – were the subject of extensive briefing, an all-day hearing on January 23, 2001, and, on April 24, 2001, a 28-page report and recommendation by Magistrate Judge Chrein.[2] As to the class actions, Judge Gleeson has approved a settlement between the plaintiff classes and certain (but not all) defendants, and entered defaults with respect to claims and cross-claims against the non-settling defendants. The parties' submissions relating to damages against the defaulting parties are now under submission before Magistrate Judge Chrein. Finally, Daiwa and BDO have filed independent actions in the transferee court against The Grande Holdings Limited ("Grande"), MTC's principal shareholder, seeking contribution in connection with *Kayne*. The parties to the *Grande* cases have proceeded with fact discovery and are presently scheduled to complete expert discovery this summer.

Petitioners initially sought remand of *Kayne* in late 1997, before this Court decided *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). In

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[2] In the event that Judge Gleeson does not approve the proposed settlements, the deposition of BDO's accounting experts and expert discovery with respect to the third-party claims against HSBC may be necessary.

response to the announcement by counsel for the *In re MTC* and *Ellis* classes of an agreement in principle as to a partial settlement with certain (but not all) defendants, Judge Gleeson directed the parties to show cause why *Kayne* should not be remanded to the Central District of California. At a November 7, 1997 hearing, after receiving papers in support of remand from petitioners, Judge Gleeson determined that he would complete the task delegated to him by the JPML. He ruled that, although he was inclined to return *Kayne* to the Central District of California for trial, that case would remain in the Eastern District of New York until "the conclusion of all pretrial proceedings," including expert discovery and dispositive motions.

In October 1998, following a series of adverse rulings relating to (among other things) expert discovery, petitioners moved before Judge Gleeson to stay all further proceedings and consider remand a second time. In support of their application, petitioners pointed to the approval and consummation of the partial class action settlements previously considered by the district court. On June 1, 1999, after full briefing of the relevant issues, Judge Gleeson again declined to suggest remand. Noting the pendency before him of various MTC-related matters other than *Kayne* and the efficiencies from continued pretrial proceedings in New York, Judge Gleeson held that, notwithstanding the class action settlements, *Kayne* was still a "coordinated" case under 28 U.S.C. § 1407(a). (Pet. App. 11).[3]

Just three weeks later, on June 22, 1999, petitioners urged the transferee court to consider remand yet a *third* time, based solely on the settlement of third-party claims in the class actions against Canaccord Capital Corp. and

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[3] "Pet. App." refers to the Appendix to the Petitioners' Brief.

Charles MaLette. In his report recommending denial of that motion, Magistrate Judge Chrein held that the Canaccord settlement provided no basis to upset Judge Gleeson's November 7, 1997 and June 1, 1999 determinations that his role in *Kayne* was not yet complete. The Magistrate Judge's report also found that, given ongoing expert discovery and the pendency of pretrial motions, "Judge Gleeson's familiarity with the issues involved in *In re MTC* continues to counsel against remand." (Pet. App. 8-10). On October 27, 1999, after still another round of briefing on the remand issue, Judge Gleeson overruled petitioners' objections and adopted Magistrate Judge Chrein's report, reiterating his June 1, 1999 ruling. (Pet. App. 6-7).

In March 2000, although unable to identify any change of circumstances warranting departure from Judge Gleeson's October 1999 ruling (or any of his prior refusals to suggest remand of *Kayne*), and despite the fact that coordinated pretrial proceedings were still ongoing, petitioners moved for remand before the JPML. After full briefing and oral argument, the JPML's seven judges unanimously denied petitioners' motion on May 30, 2000. The panel reasoned that Judge Gleeson "has become thoroughly familiar with the issues in this complex docket involving claims asserted against a myriad of defendants arising out of sales of [MTC] securities." (Pet. App. 4). The panel also pointed to the "great progress" made by Judge Gleeson in "shepherd[ing] class settlements with respect to most of the principal defendants . . . as evidence of why Judge Gleeson is in the best position to provide insight as to the future course of *Kayne* and the remaining MDL-1059 proceedings before him." (Pet. App. 4-5). Finally, the JPML noted that Judge Gleeson (and Magistrate Judge Chrein) were unpersuaded on four separate occasions that remand of *Kayne* was appropriate and the panel was likewise unconvinced that remand was

proper in the absence of a suggestion of remand from Judge Gleeson. (Pet. App. 5).

Petitioners then sought an extraordinary writ of mandamus from the Court of Appeals for the Second Circuit, directing the JPML to remand *Kayne* immediately, prior to the completion of coordinated pretrial proceedings. On January 9, 2001, the Court of Appeals denied petitioners' application, holding that they had not "sufficiently demonstrated that the [JPML] clearly abused its discretion or usurped judicial power." (Pet. App. 2). The Court of Appeals decision cited *In re Patenaude*, 210 F.3d 135, 143 (3d Cir.), *cert. denied*, 121 S. Ct. 565 (2000), a recent Third Circuit decision holding that "the fact that all of the proceedings with which [an] individual action was 'coordinated' had already concluded [does not] raise a bar" to continued transferee court jurisdiction over pretrial proceedings under 28 U.S.C. § 1407. (Pet. App. 2).

In an unbroken string of unanimous rulings, *twelve* federal judges have now rejected petitioners' six applications for immediate remand of *Kayne* prior to the completion of coordinated pretrial proceedings. Nevertheless, petitioners now seek a writ of certiorari from this Court.

REASONS FOR DENYING THE WRIT

Petitioners have failed to demonstrate that the Second Circuit's denial of mandamus relief raises any special or important issue amounting to a "compelling reason" for review in this Court. Sup. Ct. Rule 10. Under settled law, the writ of mandamus is reserved for "exceptional case[s]," and will not issue merely to correct an erroneous decision below. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 382-83 (1953). Thus, in order to obtain mandamus relief in this case, petitioners had to demonstrate that the JPML's refusal to remand *Kayne* immediately amounted to "a clear abuse of discretion" or "a usurpation of [the

judicial] power." *Mallard v. United States District Court*, 490 U.S. 296, 309 (1989) (internal citations omitted). Far from carrying that onerous burden, petitioners failed to demonstrate *any* error in the JPML's determination. Indeed, the JPML *correctly* determined – consistent with 28 U.S.C. § 1407 and entirely harmonious authority from this Court and the Courts of Appeals – that "coordinated" pretrial proceedings are ongoing in *Kayne* and immediate remand is inappropriate.

I. THE JPML CORRECTLY DETERMINED THAT NEITHER 28 U.S.C. § 1407 NOR THIS COURT'S RULING IN *LEXECON* REQUIRES IMMEDIATE REMAND

Petitioners erroneously assert that "coordinated or consolidated pretrial proceedings" with respect to *Kayne* have ended – and 28 U.S.C. § 1407, as interpreted in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), requires immediate remand – because "only proceedings specific to [*Kayne*] remain" before the transferee court. (Pet. Br. 9).[4] Their contention lacks either factual or legal support. First, a number of MTC-related actions other than *Kayne* are still before Judge Gleeson. Second, this Court's *Lexecon* ruling, rather than compelling immediate remand, establishes that Judge Gleeson would have authority to *complete* all pretrial proceedings in *Kayne*, even if no other MTC-related litigation remained in the transferee court.

A. *KAYNE* REMAINS COORDINATED BEFORE JUDGE GLEESON WITH OTHER MTC-RELATED MATTERS

Petitioners incorrectly suggest that coordinated proceedings in MDL 1059 have ended because only

[4] "Pet. Br." refers to the Petitioners' Brief.

proceedings specific to *Kayne* remain before Judge Gleeson. In fact, *Kayne* and a number of other, overlapping MTC-related matters are still pending in the transferee court – precluding any showing that the JPML's denial of remand warrants mandamus relief.

Daiwa and BDO are pursuing independent actions in the transferee court against Grande, MTC's principal shareholder, seeking contribution in connection with *Kayne*. On April 9, 2001, the parties deposed the remaining fact witness in the *Grande* actions, and expert discovery is presently scheduled to be completed this summer. Since Grande's potential liability is substantially derivative of MTC's, the issues in those actions overlap significantly with the issues in *Kayne*. Similarly, and making for additional overlap, expert discovery in *Kayne* may be relevant to the *Grande* actions. The *Kayne* plaintiffs' claims for proxy violations (under section 14(a) of the Exchange Act and SEC Rule 14a-9) against MTC and the Individual Defendants also raise issues as to the conduct of Grande in connection with MTC. Moreover, the complaints against Grande both explicitly seek contribution in the event BDO or Daiwa is held liable in damages for any of the proxy violations alleged in *Kayne*. Recognizing the overlap between *Kayne* and the *Grande* actions, the *Kayne* plaintiffs have sought to participate in *Grande* fact discovery and requested documents produced in discovery by Grande.[5]

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[5] The transferee court's discovery rulings further underscore the coordination between *Kayne* and the *Grande* cases. For example, in September 2000, petitioners and HSBC sought the transferee court's permission to attend and question at the depositions of certain Grande executives, scheduled to be held in Singapore during October 2000. At a September 25, 2000 hearing, Magistrate Judge Chrein, denied that request, noting that
(footnote continued)

In addition, Daiwa, the Individual Defendants, BDO, and MTC have asserted cross-claims against Miko and Sit Wa Leung (MTC's former principals) and Alan Leung (a former MTC executive), in connection with *both* the MTC class actions and *Kayne*.[6] Class plaintiffs' claims against the Leungs also remain pending. On motions by class plaintiffs, Daiwa, the Individual Defendants, BDO, MTC and HSBC, Judge Gleeson entered defaults on the class action claims against the Leungs. Magistrate Judge Chrein is now considering the parties' submissions relating to damages against the Leungs so that judgments can be entered upon those defaults.

Finally, *Kayne* itself has been the subject of much recent activity before the transferee court. The parties have completed fact discovery, exchanged expert reports and are completing expert depositions. The transferee court is considering motions for findings of good faith and entry of

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fact discovery in *Kayne* had been closed for nearly three years and that permitting numerous parties to participate in the *Grande* depositions would jeopardize a schedule set months earlier for completion of expert discovery in *Kayne* and fact discovery in *Grande*. Simultaneously, the Magistrate Judge limited the use of testimony by Grande witnesses so as to avoid any potential prejudice to petitioners and other parties to *Kayne* denied the opportunity to examine. The Magistrate Judge's careful balancing of discovery schedules and case management needs in related actions against potential prejudice to the parties in those actions – affirmed by Judge Gleeson – reflects precisely the centralized control characteristic of "coordination" under 28 U.S.C. § 1407.

[6] HSBC likewise has asserted claims against Miko and Sit Wa Leung in connection with the class actions and *Kayne*.

bar orders in connection with proposed settlements between BDO, HSBC and petitioners, and will be asked to set a schedule for dispositive motions. After extensive briefing and an all-day hearing on January 23, 2001, Magistrate Judge Chrein issued his report and recommendation as to the settlement-related motions on April 24, 2001. Those motions likely will be the subject of further litigation before Judge Gleeson.

B. *LEXECON* AND *PATENAUDE* ESTABLISH THAT *KAYNE* WOULD STILL BE A COORDINATED PROCEEDING EVEN IF NO RELATED CASES WERE PENDING

Even if no other MTC-related matters were proceeding in the transferee court, the JPML's refusal to remand *Kayne* immediately would not have violated either section 1407 or the principles enunciated by this Court in *Lexecon*. To the contrary – as the Third Circuit recognized in *In re Patenaude*, 210 F.3d 135 (3d Cir.), *cert. denied*, 121 S. Ct. 565 (2000) – *Lexecon* confirms that *Kayne* would be a coordinated case even if *all* other MTC-related cases had terminated.

In *Lexecon*, plaintiffs sued two law firms, Milberg Weiss Bershad Hynes & Lerach and Cotchett, Illston & Pitre, in the Northern District of Illinois. *Lexecon*, 523 U.S. at 28-29. In June 1993, the JPML transferred *Lexecon* to the District of Arizona, for consolidated or coordinated pretrial proceedings with other litigation relating to Charles Keating, American Continental or Lincoln Savings & Loan. In March 1994, while discovery progressed in the *Lexecon* action, the Arizona court entered final judgment with respect to all of the cases before it, except Lexecon's action against Milberg and Cotchett. In August 1994 and November 1994, Lexecon asked the Arizona court to remand its case against Milberg and Cotchett back to Illinois. The Arizona court refused and required the parties

first to complete pretrial discovery in Arizona and then heard summary judgment motions. In April 1995, the Arizona court granted summary judgment for defendants on all claims against Cotchett (later made final under Fed. R. Civ. P. 54(b)) and all but one of plaintiffs' claims against Milberg, and transferred that remaining claim – a defamation count – to itself for trial pursuant to 28 U.S.C. § 1404(a). *Id.* at 29-31. Following a defense verdict at trial and affirmance in the Ninth Circuit, this Court granted certiorari. Plaintiffs sought a ruling by this Court vacating all district court orders after the conclusion of consolidated pretrial proceedings – including the summary judgment in favor of Cotchett.

Although this Court ultimately concluded that the Arizona district court lacked statutory authority under section 1407 to transfer the defamation claim against Milberg to itself for trial, the Court also found that, notwithstanding the prior termination of all the other Lincoln Savings litigations transferred by the JPML, the Arizona district judge still had authority to conduct pretrial proceedings at the time of the self-transfer motion. Justice Souter noted that "coordinated" pretrial proceedings are not "narrowly limited" to situations where multiple actions are pending simultaneously in the transferee district. Rather, he reasoned, even months after the final settlement of the other Lincoln Savings cases, *Lexecon* was "'coordinated' with the conduct of earlier cases sharing the common core of the Lincoln Savings debacle, if only by being brought before judges in a district where much of the evidence was to be found and overlapping issues had been considered." *Lexecon*, 523 U.S. at 33-34.

Given Justice Souter's conclusion that "coordinated or consolidated" pretrial proceedings had not concluded as of April 1995, the Court further found no error in the Arizona court's grant of summary judgment in favor of Cotchett,

well after the termination of the other Lincoln Savings actions. Justice Souter noted that:

> Although Cotchett's request for an order of dismissal under Rule 54(b) was not granted until after the Arizona court had assigned the case to itself for trial, there is no reason to reconsider that dismissal order. It was perfectly proper as a pretrial order and, for that matter, was merely the formal reflection of the Arizona court's decision on the merits of the claims that had been resolved prior to that court's decision on the § 1404 transfer motion.

Id. at 43 n.6.

The Third Circuit applied *Lexecon's* broad definition of "coordination" under 28 U.S.C. § 1407 in *Patenaude*, a case arising from the JPML's transfer of numerous asbestos-related personal injury actions to the Eastern District of Pennsylvania. A handful of plaintiffs repeatedly moved the transferee court for suggestions of remand, noting that, during the seven years following the JPML transfer order, the only proceedings in their cases had been supplementation of certain discovery responses and unproductive settlement conferences. *Id.* at 138-39. After the transferee court failed to rule on those motions, plaintiffs unsuccessfully moved for remand before the JPML and then sought a writ of mandamus. *Id.* at 138. The Third Circuit noted that *Lexecon* "indicates that the phrase 'coordinated or consolidated' is to be interpreted broadly." The panel went on to find that "a proceeding that relates only to a single individual's case or claim can nonetheless be coordinated" because, as the *Lexecon* Court held, cases may be "coordinated" for purposes of section 1407 "if only by being brought before judges in a district where much of the evidence was to be found and overlapping issues had been considered." *Patenaude*, 210 F.3d at 142-43 (quoting *Lexecon*, 523 U.S. at 33-34). Applying those principles, the Third Circuit rejected plaintiffs' argument "that

'coordinated or consolidated pretrial proceedings' are concluded when the transferee court ceases to conduct proceedings that are common to all." Instead, the court reasoned, "it is not necessary that any one issue be common to all cases, so long as issues 'overlap.'" *Id.* at 143-44. Thus, the court held that settlement conferences in plaintiffs' cases remained "coordinated" with similar proceedings in the other asbestos-related litigation transferred by the JPML, and denied mandamus.

Contrary to petitioners' argument, *Patenaude* in no way conflicts with *Lexecon*. Rather, the Third Circuit's decision was compelled by this Court's holding that a single case transferred by the JPML remained "coordinated" under section 1407(a), despite the prior termination of *all* related cases, because of (1) the transferee court's experience with overlapping issues in other actions arising from a common factual core, and (2) the presence in the transferee district of relevant evidence. *Lexecon*, 523 U.S. at 33-34.

This Court's definition of "coordination" likewise calls for the conclusion that *Kayne* remains "coordinated" before Judge Gleeson regardless of the pendency of other MTC-related litigation. Substantial evidence relating to *Kayne* has been found in the transferee district, particularly given the New York presence of Daiwa and Rogers & Wells (Daiwa's counsel in connection with MTC's 1993 offering of securities), and the substantial production of documents and other discovery there. Further, more than half of the damages sought in *Kayne* are claimed by petitioners who reside in New York, Ohio and Germany – not California – and three New York City petitioners account for more than one third of the supposed damages in *Kayne*. Additionally, litigation relating to MTC has been pending in the Eastern District of New York since 1993. During the intervening seven and one half years, as the JPML recognized, Judge Gleeson and Magistrate Judge Chrein have become "thoroughly familiar with the issues in this complex docket

involving claims asserted against a myriad of defendants arising out of sales of [MTC] securities," including the overwhelmingly overlapping issues between *Kayne* and the class actions. (Pet. App. 4).

Given the consistent holdings in *Lexecon* and *Patenaude*, the JPML's' refusal to order an immediate remand was entirely correct and did not amount to a clear abuse of discretion or usurpation of judicial power. The Second Circuit properly declined to disturb that ruling by issuing a writ of mandamus.

II. THE JPML CORRECTLY CONSIDERED JUDGE GLEESON'S FAMILIARITY WITH THE CASE IN DECLINING TO REMAND PRIOR TO THE COMPLETION OF PRETRIAL PROCEEDINGS

Petitioners offer no authority for their novel argument that the JPML, in ruling on their motion for immediate remand, should have disregarded the familiarity of Judge Gleeson and Magistrate Judge Chrein with the MTC litigations. Not surprisingly, both the facts and the law fully support the conclusion that the transferee court's experience with the MTC litigations counsels strongly against remand before the completion of pretrial proceedings.

Courts and the JPML consistently look to the transferee judge's familiarity with the case in determining whether remand is appropriate under section 1407. *See, e.g., In re Ivy,* 901 F.2d 7, 9 (2d Cir. 1990) (denying mandamus in part because the JPML's order drew support from "real economies in transferring such cases to Judge Weinstein, who has been handling the Agent Orange litigation for several years"); *In re Holiday Magic Sec. & Antitrust Litig.*, 433 F. Supp. 1125, 1126 (J.P.M.L. 1977) (denying motion for immediate remand because the transferee judge "has become thoroughly familiar with the issues in this entire

litigation and is in the best position to determine the future course of [the opt-out case] and the non-settling claims in other actions in the transferee district in relation to each other [and] in relation to the recently affirmed class action settlement"); *In re CBS Color Tube Patent Litig.*, 342 F. Supp. 1403, 1405 (J.P.M.L. 1972).

The reasoning of *Ivy*, *Holiday Magic* and *CBS Color Tube* applies with special force in this case. Judge Gleeson and Magistrate Judge Chrein have developed, over more than six years, intimate familiarity and expertise in the highly complex facts surrounding the MTC litigations. Moreover, *all* of the pretrial proceedings in *Kayne* – including numerous substantive and countless (sometimes weekly) discovery motions – have taken place before the transferee court. Having brought *Kayne* to an advanced stage of pretrial proceedings, the transferee court is the most efficient and appropriate forum to oversee and coordinate the remaining pretrial tasks. Less than two weeks ago, Magistrate Judge Chrein issued his 28-page Report and Recommendation on the motions by BDO, HSBC and petitioners for determinations of good faith settlement, entry of bar orders, injunctions, dismissals and other relief respecting their proposed settlements. Further briefing as to those motions before Judge Gleeson is likely. The parties are completing expert discovery, and Judge Gleeson will be asked to set a briefing schedule for dispositive motions. Immediate remand of *Kayne* would significantly delay the completion of those proceedings while another federal judge learns the background of the MTC cases conducted in the Eastern District of New York since 1993. By contrast, continuing those proceedings before Judge Gleeson will accelerate resolution of the *Kayne* action, narrow the issues faced by the California court after remand and minimize the waste of judicial resources attendant on repetitive efforts.

III. THE *GRANDE* ACTIONS ARE PROPERLY COORDINATED WITH *KAYNE*

Petitioners suggest that the *Grande* actions somehow do not count as "coordinated" with *Kayne* under section 1407 because they (1) lack an "independent jurisdictional basis in the Eastern District of New York," (2) are "alter ego" actions that should not have been filed until after judgment in *Kayne*, and (3) were never formally "transferred" by the JPML. These meritless arguments present no issue worthy of review in this Court.

Petitioner's argument that the *Grande* actions lack any "independent" jurisdictional basis in the transferee court ignores settled law holding that venue is based on the facts existing at the time an action is commenced. *See Minnesota Mining & Mfg. Co. v. Eco Chem, Inc.*, 757 F.2d 1256, 1264 (Fed. Cir. 1985) ("[l]ike jurisdiction, venue 'once properly established . . . [is] unaffected by the change in parties, since it relates to the institution of the suit'") (*citing* 4 Moore's Federal Practice ¶25.05, at 517); *see also, e.g., Flowers Indus., Inc. v. F.T.C.*, 835 F.2d 775, 776 n.1 (11th Cir. 1987) ("venue must be determined based on the facts at the time of filing"). Given that the transferee district was a proper venue for the *Grande* actions when they were commenced, this argument fails.

Although BDO and Daiwa seek contribution from Grande in connection with *Kayne*, the *Grande* actions are separate from *Kayne* and are not simply "alter ego" actions. While the *Grande* actions turn in large part on MTC's role in the frauds alleged by plaintiffs, those actions also raise issues as to Grande's after-the-fact role in MTC's affairs that are distinct from *Kayne*. In any event, there is no reason – and petitioners cite to no authority for the proposition – that "alter ego" claims *must* be filed only after a judgment establishing underlying liability against the initial defendant. BDO's and Daiwa's claims against Grande are free-standing actions that support

"coordination" of pretrial proceedings before the transferee court.[7]

Petitioners' argument that *Kayne* and the *Grande* actions "were never coordinated by JPML order" is a red herring. JPML Rule 7.5(a), logically avoiding needless and duplicative motion practice, provides that "Potential 'tag-along actions' filed in the transferee district require no action on the part of the Panel." The transferee court has ruled that the *Grande* actions are properly consolidated with *In re MTC,* and they are, therefore, coordinated cases under section 1407(a).[8]

IV. JPML RULE 7.6(D) DOES NOT VIOLATE SECTION 1407

Petitioners finally contend that JPML Rule 7.6(d) – providing, in relevant part, that "[t]he Panel is reluctant to

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[7] Petitioners suggest that the transferee court has not treated *Kayne* and the *Grande* actions in coordinated fashion. As we noted above, the record does not support petitioners' contention in that regard. *See* n.4 and accompanying text, *supra.*

[8] Alternatively, petitioners float the erroneous notion that *Lexecon* calls for the conclusion that JPML Rule 7.5(a) is invalid. In *Lexecon*, the Court simply held that, because the JPML lacks statutory authority to transfer cases for trial, the Panel could not by rule authorize a transferee court to transfer an action to itself for that purpose. *Lexecon*, 523 U.S. at 40. But the Panel has authority to transfer "tag-along" actions for pretrial purposes. Given that authority, Rule 7.5(a), permitting "tag-along" cases to be coordinated without formal panel action under appropriate circumstances, falls well within the Panel's authority under 28 U.S.C. § 1407(f) to "prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure."

order remand absent a suggestion of remand from the transferee court" – violates Section 1407 because it "gives almost conclusive deference to the transferee judge." (Pet. Br. at 12). As with petitioners' other arguments, this position is factually and legally flawed.

First, the record demonstrates that the JPML in fact exercised independent judgment in ruling on plaintiffs' motion for remand. Prior to ruling on the motion, the JPML received extensive briefing from the parties, accompanied by hundreds of pages of exhibits, and entertained oral argument, at which the judges of the Panel indicated their familiarity with both the record in the case and the relevant case law, including *Lexecon*. Moreover, the opinion denying plaintiffs' motion for remand – although concisely worded – does not state that the JPML simply adopted Judge Gleeson's conclusions without further analysis. Rather, the JPML denied petitioners' motion based on its independent assessment that:

- Judge Gleeson had "become thoroughly familiar with the issues" surrounding the MTC litigations and had "made great progress and . . . shepherded class settlements with respect to most of the principal defendants" (Pet. App. 4);
- Judge Gleeson's accomplishments in managing the MTC litigations constituted "evidence of why [he] is in the best position to provide insight as to the future course of *Kayne* and the remaining MDL-1059 proceedings before him" (Pet. App. 4-5); and
- plaintiffs – apart from their failure to persuade Judge Gleeson that remand was appropriate – "also failed to convince this Panel that it should order remand in the absence of a suggestion of remand from Judge Gleeson." (Pet. App. 5).

Against that backdrop, petitioners can hardly claim that the JPML failed to exercise independent judgment in denying remand.

Moreover, contrary to petitioners' suggestion, Rule 7.6(d) neither effects a delegation of the JPML's remand authority to transferee courts nor requires transferee courts to render advisory opinions. The JPML's rules sensibly provide a structure for considering a transferee court's views as to the appropriateness of remand, but nowhere purport to *require* that transferee judges express such views. Rule 7.6(d) simply reflects a judgment that transferee courts are well-positioned to assess the need for continued coordination of pretrial proceedings, and that deference to a transferee court's views on that subject is appropriate. Thus, in *Patenaude*, the Third Circuit upheld Rule 7.6(d) against the very challenge petitioners would raise here, reasoning: "Deference is not abdication, however, and the presence or absence of a remand recommendation from the transferee judge as a factor in the [JPML's] decision-making process seems to us entirely reasonable." *Patenaude*, 210 F.3d at 146.

Finally, even if the JPML had denied petitioners' motion solely on the basis of Judge Gleeson's prior rulings – which it did not – that fact alone would not support mandamus relief. In order to obtain a writ of mandamus, petitioners would have to establish that the result reached by the JPML, denial of their motion, amounted to a "clear abuse of discretion" or "usurpation of judicial power." Proof that the JPML failed to exercise independent judgment, even if there were any, could not alone substitute for the requisite showing. *See Patenaude*, 210 F.3d at 146. Here, as we demonstrated above, petitioners have failed to identify any error in the JPML's denial of their motion for remand, much less an error sufficiently egregious to warrant mandamus relief. Petitioners' arguments fail.

CONCLUSION

The court below correctly determined – consistent with the prior decisions of this Court and the only other Court of Appeals decision on point – that the JPML's refusal to direct immediate remand of *Kayne*, prior to the completion of pretrial proceedings, was neither a "clear abuse of discretion" nor a "usurpation of judicial power." Accordingly, no compelling reason supports review in this Court, and the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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